

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**MONROE COUNTY HIGHWAY EMPLOYEES  
LOCAL UNION NO. 2470, AFSCME**

and

**MONROE COUNTY**

Case 138  
No. 56305  
MA-10234

*(Grievance of Marlin Marten)*

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Appearances:

**Mr. Daniel R. Pfeifer**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

**Mr. Ken Kittleson**, Personnel Director, on behalf of the County.

**ARBITRATION AWARD**

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Sparta, Wisconsin, on June 25, 1998. The hearing was not transcribed and both parties filed briefs that were received by July 27, 1998. Based upon the entire record and the arguments of the parties, I issue the following Award.

**ISSUE**

The parties have agreed to the following issue:

Whether the County violated the contract by suspending grievant Marlin Marten without pay for five (5) days for the August 27, 1997, incident and, if so, what is the appropriate remedy?

### BACKGROUND

Grievant Marten - a Patrolman who works from 7:00 a.m. to 3:30 p.m. - was assigned by Foreman Randy Luther on the afternoon of Wednesday, August 27, 1997 (unless otherwise stated, all dates hereinafter refer to 1997), to be the rear flagman for a highway project on County Highway "N". Marten was responsible for making sure that drivers behind him did not drive on the oily pavement being laid down by another County truck. It therefore was necessary for him, or someone else, to serve as the flagman throughout the entire afternoon's work. That was not part of Marten's regular job duties, as he had only performed flagging on a few prior occasions. Marten was asked that day whether he could work past his normal 3:30 p.m. quitting time and he replied that he could not.

At around 2:00 p.m., the work crew paused by Oakdale and started up work again at about 2:30 p.m. Marten then decided on his own to drive about 5 miles from that project to pick up a fallen road side sign that warned about loose gravel. Marten did not tell Foreman Luther that he was doing so and he similarly did not get anyone else to replace him as the rear flagman once the repaving began.

Employee Hugh Zwiefel, who is in the bargaining unit, testified that he prepared a statement (County Exhibit 1), about what happened at that time and that everything he had stated therein was true. Said statement provided:

...

(2) At appr. 2:30 I pulled around the trucks and chipper in Oakdale after I had filled with oil. I stopped to put my spray bars down to get ready to spray. When I was almost rear-ended by a pickup. I yelled where are ----- the flagmen. At that point I saw Marlin come from the shade got in the pickup and pull out and went down the road. I thought he went to set up to flag. I looked at the time. It was 2:35. When I started to spray I saw Jerry M. pull to the front of me and start to flag.

At that point I looked in the mirror and saw a motorhome - driving in the oil. That's when I saw Randy L. start flagging the rear of the project.

...

We may need to have a meeting on the proper ways to flag so everyone knows what's going on.

Zwiefel admitted at the hearing: "I was a little hot that day."

Foreman Luther who also is in the bargaining unit, prepared a written statement (County Exhibit 2), which he also said was true. It stated:

Started sealcoating 7:30 only 1 flag person there. I flag until we were in an area where 1 men could do it. 8:10 the other flag person [i.e. Marten] got there. I told Marlin to flag behind and to sweep any piles of chips left by trucks. Ask if he had a broom. He did. Later I stop and told he to take down the sign when done with CTH + EW and move them to CTH-N by Oakdale.

Started sealing CTH-N about 12:00 to 12:30. We move back around 2:00. I talk to him about working late. Marlin said he could not. I talk to Jerry Kast about who we could used for a flagmen. We decided the broom man would have swept far enough ahead to have him do it. I was on my way to get the broom man Gary when I got to where Marlin was suppose to be and there was no flagman there. I looked at my watch. It was 20 to 3:00. Traffic was having problems so I flag then I called Gary to come back and flag. I flag until he got there. The radio in the lead flagman pickup was not working all the time so I then traded pickup with him.

...

Luther testified that Marten had a truck radio on August 27 that he could have used to tell Luther he was leaving and that standard procedure calls for having the flagman remain on the job until a replacement arrives.

Truck driver Ernest P. Hansen testified that as he was driving by, he saw Marten put up a loose gravel sign that day shortly before 3:00 p.m.

Highway Commissioner Norbert Smith testified that he investigated the August 27 incident after it was brought to his attention and that Marten's failure to remain as flagman that day represented a "very serious safety violation" and that it could have caused heavy property damage because vehicles could have slid out of control on the oil being applied. Smith acknowledged on cross-examination that: "We do not have a formal established policy for flagging"; that employes have not been trained for flagging; and that busy areas sometimes do not get a flagger. He also said it was the "Commonsense thing" for Marten to remain as the rear flagger on August 27 and that Marten should have asked other drivers to pick up the loose gravel sign that had fallen over because there was no immediate need for him to have done so.

Smith by letter dated August 28 suspended Marten for five days and told him:

...

Re: Disciplinary Action, 5 Day Suspension

As I stated during our meeting this morning, I have decided to suspend you for 5 working days without pay for your actions on Wednesday, August 27, 1997. The effective days of your suspension shall be Monday, September 8, 1997 through Friday, September 12, 1997.

You were assigned to the traffic control job (flagman) for our sealcoating operation on that day. The Patrol Superintendent informed me that you left the job site at 2:40 PM and returned to the Tomah shop because you could not work overtime. You didn't inform the crew foreman that you were leaving and the job was unprotected for a period of time before another flag person could be assigned. By doing so, you placed your fellow employees and the public in danger.

I consider leaving your job assignment without a replacement flag person a very serious disregard for safety which is the basis for this disciplinary action. You are put on notice that any future behavior or performance problems may result in serious discipline up to and including dismissal.

...

Marten grieved his suspension, hence leading to the instant proceeding.

### **POSITIONS OF THE PARTIES**

The Union argues that the County "has been lax in the area of education and assignment of flagging duties"; that it has been "inconsistent in the assignment of flagging duties"; that the County in the past has not always used a flagman under similar circumstances; that management knew that Marten would not work late that day; and that there was no reason for the County to wait until September 8 to impose Marten's suspension. As a remedy, the Union asks for recession of his suspension, a back pay award, and expungement of his suspension from his personnel file.

The County, in turn, contends that Marten left his flagging duties without permission because he "did not wish to draw attention to himself. . ." and that in doing so, "Marten abandoned his flagging post without taking reasonable and prudent steps to protect his co-workers and the public from possible harm."

**DISCUSSION**

The record does indeed show, as contended by the Union, that the County in the past could have done more to train employes in proper flagging techniques; that its flagging policies at times have been inconsistent; and that Marten did not have extensive flagging experience before August 27.

But, none of that can overcome the single most important fact in this case: Marten committed an inexcusable act of gross negligence on August 27 when he left the paving site on his own without telling anyone else where he was going and when he abandoned his flagging duties, thereby creating the safety hazard alluded to by fellow bargaining unit member Zweifel. For even if Marten did not have much prior flagging experience, he certainly knew – or should have known – that he could not leave his fellow employes in the lurch in that manner. The County therefore had just cause to impose its five-day suspension even though it was delayed since said delay did not prejudice Marten in any way.

In light of the above, it is my

**AWARD**

That the County had just cause to suspend grievant Marlin Marten without pay for five (5) days for the August 27, 1997, incident; his grievance is therefore denied.

Dated at the City of Madison, Wisconsin this 31<sup>st</sup> day of August, 1998.

Amedeo Greco /s/

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Amedeo Greco, Arbitrator